7UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

AUGUSTA NEWS COMPANY, Plaintiff v. HUDSON NEWS COMPANY, PORTLAND NEWS COMPANY, and HUDSON-PORTLAND NEWS COMPANY, Defendants	)))))))))))	Civil No. 99-CV-166-B

RECOMMENDED DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (DOCKET NO. 32)

Plaintiff Augusta News Company seeks treble damages against Defendants Hudson News Company, Portland News Company and Hudson-Portland News Company for alleged violations of federal and state anti-trust law. Specifically, Plaintiff contends (1) that the Defendants violated section 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1, and section 1101 of the Maine Revised Statutes Title 10 by conspiring to divide the market for magazine and periodical distribution in the State of Maine (Counts I and II) and (2) that the Defendants violated Section 2(c) of the Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13(c), by paying up-front fees to chain retailers to secure contracts for the distribution of magazines and periodicals (Count III).

The Defendants move for summary judgment on the grounds, *inter alia*, that their actions introduced competition into a market where none had historically existed and that the payment of up-front fees did not amount to a commission or brokerage of the sort prohibited in the Robinson-Patman Act. I recommend that the Court GRANT the Defendants' motion with respect to all three counts.

I. Summary Judgment Facts

The facts for purposes of summary judgment are comprised of the uncontroverted statements of material fact appended to the parties' summary judgment pleadings and those controverted statements of material fact that are supported by the summary judgment record. Augusta News Company ("ANC") is a Maine corporation located in Augusta. ANC formerly engaged in the business of wholesale distribution of magazines, newspapers and other periodicals in Maine. (Parties' Successive Statements of Material Facts ("SMF"), Docket Nos. 33, 38 & 46 at ¶¶ 1.)[1] ANC ceased doing business in July, 1996. (*Id.*) Hudson News Company ("Hudson") and Portland News Company ("PNC") were similarly engaged in and continue to be engaged in the wholesale distribution and sale of magazines, newspapers and other periodicals in Maine. (*Id.* at ¶¶ 2-3.) Hudson is a New Jersey corporation with a principal office in North Bergen, New Jersey. PNC is a Maine corporation located in Scarborough. (*Id.*)

The system of magazine and periodical distribution in the United States is comprised of retailers, publishers and regional and local wholesale distributors. Prior to 1995-96, there were a total of five local magazine and periodical distributors in the State of Maine, including ANC and PNC, each of which operated in exclusive territories without any significant competition from the others. (*Id.* at ¶¶ 4-5.) These territorial monopolies were the product of history and custom and arose largely due to the practices of the large publishing houses, which would limit the number of magazines and

[1] "Defendants' Reply to Plaintiff's Response to Defendants' Statement of Material Facts," Docket No. 46, reproduces the factual statements contained in the preceding Statements.

periodicals delivered to local distributors to prevent them from expanding beyond their territorial boundaries or from competing for retailers located on or near the borders of their territories. (*Id.* at ¶¶ 7-9 & 12.)

Within this system, large retailers with stores located in several territories were forced to purchase their magazines and periodicals from the local distributors, regardless of the quality of service provided or the economic inefficiencies of multiple billings and an absence of price competition. (*Id.* at ¶¶ 10-11 & 13.) In mid- to late-1995, certain large retail chains rebelled against this medieval system and began demanding consolidated service covering larger territorial expanses or all of the stores in their chains. (*Id.* at ¶ 14.) The stimuli for this development were primarily a wave of increased consolidation among the retail chains, decreased periodical sales and the commencement of investigations by the Department of Justice into the publishing houses' practice of controlling magazine allotments among distributors. (*Id.* at ¶ 15.) In Maine, large chains such as CVS, Hannaford's, Rite Aid and Wal-Mart sought bids from or made offers to wholesale distributors interested in supplying magazines and periodicals on a regional or chain-wide basis. (*Id.* at ¶ 16.)

In response to this new demand, in about September 1995, approximately 15 wholesale distributors in the New England region banded together to form Retail Product Marketing, Inc. ("RPM"), in order to compete for regional chain business. (*Id.* at ¶ 18.) Pursuant to RPM's by-laws and operating procedures, Dennis Drost, RPM's Director of Marketing and Sales, possessed the authority to submit bids to those chain retailers seeking service on a regional basis. If RPM won a retailer's business, Drost would determine which RPM member was available to service the retailer's stores in different locations and would assign a member based, in part, on retailer preference. RPM would centrally bill the retailer for that members' service. (*Id.* at ¶¶ 20-21.) As part of each bid or offer that RPM sent to each regional chain retailer, Drost offered up-front payments in exchange for exclusive distribution contracts. (*Id.* at ¶ 26.)

The only distributors to join RPM in Maine were PNC and Magazines, Inc., a local, Maine distributor based in Bangor. (*Id.* at ¶¶ 6, 18, 20.) Although Drost asked ANC to join the organization, Howard Kunitz, the President of ANC, refused. According to Kunitz, he considered the payment of up-front fees to be illegal as well as unprofitable. (*Id.* at ¶ 26; Kunitz Depo., Tab 32, at 184 & 188.)

Not all chain retailers sought bids or waited for offers. Wal-Mart, for instance, conducted its own search for regional distributors. (SMF at ¶¶ 30, 34.) In 1995 and 1996, Wal-Mart had approximately 2,300 stores in the U.S. that were serviced by 305 different wholesale magazine and periodical distributors. (*Id.* at ¶ 27.) Wal-Mart sought large distributors that could service major territories and also provide electronic billing and data processing. (*Id.* at 30, 34.) Unlike the other chains, Wal-Mart did not seek up-front store fees. (*Id.* at ¶ 34.) Based on its search criteria, Wal-Mart eventually awarded all of its nationwide business to three distributors. Wal-Mart chose Hudson to service the Northeast. (*Id.* at ¶ 31.) As a result of this development, ANC lost four Wal-Mart stores within its territory that accounted for about 10% of ANC's sales. (*Id.* at ¶ 33.)

Hannaford also sought consolidated service in 1995. (*Id.* at ¶ 39.) Up to that date, Hannaford had 80 stores in Maine, Massachusetts, New Hampshire, New York and Vermont, which were serviced by approximately 14 distributors. (*Id.*) In 1995, Hudson and RPM submitted competing proposals to service all of Hannaford's stores. (*Id.* at ¶

40.) Both proposals offered Hannaford up-front store fees. (*Id.*) Hudson's successful proposal required that Hudson pay $1000 per store to be able to supply magazines and periodicals to Hannaford's. (*Id.* at ¶ 48.) According to Kunitz, ANC also submitted an offer at this time to supply all of Hannaford's Maine stores. (*Id.*) However, according to Mike St. Clair, Hannaford's "Category Manager in Charge of Nonfoods," he never received a proposal from ANC. (*Id.*) St. Clair also testified at his deposition that he would not have accepted an offer to have ANC service only Hannaford's Maine stores because Hannaford sought greater consolidation in this "category." (*Id.* at ¶ 43.) Because Hudson won Hannaford's business, ANC lost 11 stores that had previously been in its exclusive territory. (*Id.* at ¶ 46.) This loss amounted to approximately 40% of ANC's business. (*Id.* at ¶ 52.)

After Hudson obtained the Wal-Mart and Hannaford's accounts, Hudson contacted PNC to pursue having PNC service the Wal-Mart and Hannaford's stores in Maine. (*Id.* at ¶¶ 36, 48, 50.) On December 21, 1995, Hudson and PNC signed a memorandum of understanding providing that PNC would service these chain and others obtained by Hudson. Hudson and PNC agreed to form a LLC to carry out this joint-venture. Additionally, Hudson agreed "to enter into good faith negotiations to acquire for the LLC the business presently operated as Augusta News." (*Id.* at ¶ 53.) In January 1996, Hudson offered to purchase ANC from Kunitz, who refused the offer. (*Id.*) Subsequently, in February 1996, Hudson and PNC formed the LLC, Hudson-Portland Distributors ("Hudson-Portland"). (*Id.* at ¶ 48.) Hudson-Portland did not independently solicit chain business. Rather, it existed to serve the regionally based retail chain customers that Hudson might obtain. For its part, PNC had no obligation to refer any business it acquired to the LLC. (*Id.* at ¶¶ 48, 51.)

In March 1996, Hudson "obtained" the K-Mart stores throughout the Northeast, agreeing in a three-year contract to pay fees of between $1000 and $5000 per store. (*Id.* at ¶ 52, 54.) In July 1996, Hudson obtained the Cumberland Farms account as well, agreeing in a three-year contract to pay a fee of $1000 per store. (*Id.* at ¶ 55.)

Meanwhile, RPM was successful in obtaining the distribution contract for Shaw's Supermarkets. As a result of this acquisition, PNC and Magazines, Inc., the only Maine distributors in RPM, began servicing Shaw's Maine stores, two of which had previously been in ANC's exclusive territory. They agreed to pay $10,965 for each of Shaw's 16 Maine stores as part of a three-year contract. (*Id.* at ¶ 58.) Additionally, RPM acquired the accounts for Christy's Stores in New England, and CVS and Rite Aid stores in Maine. The Christy's three-year contract called for payments of $12,050 for each of 15 stores in Maine. (*Id.* at ¶ 60.) The CVS three-year contract required payments of between $667 and $1000 per store in up-front fees. (*Id.* at ¶ 61.) The Rite Aid three-year contract called for per store payments of $15,000. (*Id.* at ¶ 62.)

Different deponents describe the purpose of the up-front fees in various ways. Drost described the fees as consideration for a three-year commitment from retailers. St. Clair described the fees simply as a means of increasing corporate revenues for the chains. Michael Bloom, Category Manager with CVS, described the fees as being paid to "pick up additional business." Michael Kessler, a publishing consultant to retailers, described store fees as "a fee based on a contract for a period of time." (*Id.* at ¶ 71.)[2] According to Drost, payment of the up-front fees in 1995-96 was "not economically

[2] The testimony of other deponents described by the Defendants in ¶ 71 is too indefinite to draw on.

feasible," but was offered because "[w]hen you are bidding for your life, you do what you have . . . to do." (*Id.* at ¶ 91; Drost Depo., Appendix Tab 27, at 60.)

By July 1996, ANC had lost the business of all of the Christy's, Cumberland Farms, CVS, Hannaford, K-Mart, Rite Aid, Shaw's and Wal-Mart stores in its territory to either Hudson or RPM. Of the accounts RPM obtained in Maine, some were delegated to Magazines, Inc., and the balance were delegated to PNC for service. Of the accounts Hudson obtained in Maine, all were delegated for service to the Hudson-Portland LLC. With the loss of the chain retailers, the vast majority of its sales, ANC decided to cease operations in July 1996. (*Id.* at ¶¶ 1, 52, 83.)

In 1999, Hudson and RPM merged their operations to form Hudson-RPM Distributors, LLC. (*Id.* at ¶ 91.) Hudson-RPM is now the only regional distributor servicing the large retail chains in Maine. (*Id.*) Hudson-RPM no longer pays up-front fees to the retail chains. (*Id.*) As was the case prior to 1995-96, publishers continue to pre-print the retail price of magazines on the cover of each magazine. (*Id.* at ¶ 92.) There are no facts in the record that indicate publishers have increased cover prices as a result of the consolidation or "regionalization" of magazine distribution to retail chains.[3] (*Id.*) Nor do the parties' statements of material fact indicate that this development has

[3] ANC offers expert testimony that magazine prices will increase because the large distributors will exact larger discounts from publishers in order to make up for their tighter margins. (SMF at ¶ 92, citing Cotterill Depo. at 60-62.) However, ANC presents no facts concerning the current profitability of the Defendants' operations. Moreover, ANC observes in its response to ¶ 91 that "Hudson/RPM offered no up-front fees to the chains in 1999." This fact tends to refute the notion that the Defendants' profit margins remain unviable. In any event, the fact that regional distributors' profit margins have diminished per product is not necessarily an indication that their overall profitability has declined given that the volume of their business is greatly expanded.

had an impact on the number of titles available to consumers on the retail stands.[4] (*Id.* at ¶¶ 95, 97.)

II. Summary Judgment Standard

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court views the record on summary judgment in the light most favorable to the nonmovant. *See Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 50 (1st Cir. 2000). However, summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party has presented evidence of the absence of a genuine issue, the nonmoving party must respond by "placing at least one material fact in dispute." *FDIC v. Anchor Properties*, 13 F.3d 27, 30 (1st Cir. 1994) (citing *Darr v. Muratore*, 8 F.3d 854, 859 (1st Cir. 1993)).

III. Discussion

According to ANC, "Hudson, [PNC] and the [Hudson-Portland LLC] effectively raised an insurmountable barrier to entry into the distribution business for any entity which declined—or could not afford—to pay up-front store fees in addition to the increase in discounts the chains demanded, and [among] themselves had allocated . . . all

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[4] ANC complains that retailers have shortened their "authorized lists" since consolidation. Authorized lists describe those titles retailers want on their shelves. They are created based on sales data. Retailers do not want to accept titles on their shelves that customers do not purchase. (Bloom Depo. 69-70; Kessler Depo. 52-53; Long Depo. at 52-53; McKay Depo. at 30, 47-48.) The record does not generate any evidence that shorter authorized lists relate to distributor consolidation or are injurious to consumer welfare. If an inference is to be drawn, it is that more copies are now available of titles consumers want to read.

the distribution business in Maine." (Plaintiff's Objection, Docket No. 37, at 2.) According to ANC, these acts violated both Section 1 of the Sherman Act and Section 2(c) of the Robinson-Patman Act. ANC's theory ties these two claims together by contending that the payment of up-front fees is prohibited by Section 2(c) and that it was put out of business and "economically devastated" because it refused to violate this law, unlike the Defendants, who won the chain retailer market in restraint of trade by, *inter alia*, conspiring to pay these illegal fees. (*Id.*)

1. Section 1 of the Sherman Act

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U. S. C. § 1.

> The purpose of the Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest.

Spectrum Sports v. McQuillan, 506 U.S. 447, 458 (1993). The elements of a Section 1 claim are (1) an agreement among the defendants (2) that unreasonably restrains trade, (3) affects interstate commerce and (4) causes injury to the marketplace and to the plaintiff. *See DM Research v. College of Am. Pathologists,* 2 F. Supp. 2d 226, 228 (D. R.I. 1998), *aff'd*, 170 F.3d 53, 55 (1st Cir. 1999); 15 U.S.C. § 15(a).

The Defendants challenge every element but the third. The first element requires "an agreement, either express or implied, between two or more parties to accomplish an unlawful objective or to accomplish a lawful objective by unlawful means. Unilateral action by one party is not sufficient . . . ." *Id.* (citation omitted); *accord Monahan's*

Marine, Inc. v. Boston Whaler, Inc., 866 F.2d 525, 526-27 (1st Cir. 1989). The second element sets forth the primary battle ground of anti-trust litigation because "[e]very agreement concerning trade . . . restrains." *Chicago Bd. Of Trade v. United States*, 246 U.S. 231, 238 (1918). Thus, the Supreme Court construes Section 1 to prohibit only unreasonable restraints on trade. *See Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911). Nevertheless, "almost any agreement between independent actors that restrains competition is potentially subject to examination for 'reasonableness' . . . ." *D.M. Research v. College of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999).[5] The reasonableness test requires courts to weigh the anticompetitive effects of a contract or combination against the legitimate business justifications for a contract or combination. *See Sullivan v. NFL,* 34 F.3d 1091, 1096 (1st Cir. 1994). Skipping over the third element, not challenged here, the forth element, injury, concerns the overarching purpose of the Sherman Act: preservation of "free and unfettered competition as the rule of trade." *N. Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958). Market injury is measured by the anticompetitive effects an agreement in restraint of trade has on the relevant market, usually reflected by "a reduction in output and an increase in prices" or "decreased efficiency in the marketplace [that] negatively impacts consumers." *Sullivan*, 34 F.3d at 1096-97 (citation omitted). A secondary aspect of the injury element arises when the plaintiff bringing the claim is a competitor in the marketplace harmed by a defendant's allegedly anticompetitive practices. In such a circumstance, the plaintiff must also prove a particularized injury to his or her business interest. *See R.W. Int'l Corp. v. Welch Food, Inc.,* 13 F.3d 478, 487 (1st Cir. 1994).

[5] Certain *per se* categories of anticompetitive conduct have been identified as well. *See Business Elecs. Corp. v. Sharp Elecs. Corp.,* 485 U.S. 717, 723 (1988) (citing *Standard Oil Co.* v. *United States*, 221 U.S. 1, 60 (1911)).

The Defendants argue, *inter alia*, that ANC's restraint of trade claims are baseless because the changes that occurred in the chain retailer market in 1995-96 introduced competition into a market that had historically been anticompetitive and monopolistic. They argue that ANC simply could not compete on a regional basis and, because it refused to join an organization that could, self-selected out of the competition. (M/D at 7-9.) Based largely on these facts and the fact that magazine cover prices are set by the publishers, Defendants argue that ANC cannot show any harm to consumers. (M/D at 14.)

Without addressing the many arguments surrounding the existence of an agreement in restraint of trade or the reasonableness or legality of paying the up-front fees, I agree with the Defendants that, on the facts of this case, the fourth element of the Section 1 claim is not met: there is no injury to consumer welfare. As discussed in the fact section and notes 3 and 4, *supra*, the summary judgment record does not support ANC's contention that the consolidation or "regionalization" of the system of distribution to certain retail chains increased prices or reduced efficiency or output at the consumer level.

ANC argues that the current state of affairs, specifically the merger between Hudson and RPM, is harmful to the consumers' interest because there is now only one distributor in Maine. (*Id.* at 28.) The problem with this argument is that the facts indicate that, at worst, one entity now monopolizes a *sector* of the distribution market where formerly several local entities monopolized the *entire* market within their territories—i.e., the health of competition in this marketplace is the same. Because of the absence of a market injury, I recommend that the Court GRANT the Defendants' motion with respect to Counts I and II.[6]

2. Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act

Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act,[7] states:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

15 U.S.C. § 13(c). "The Robinson-Patman Act was enacted 'to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.'" *Bridges v. MacLean-Stevens Studios, Inc.*, 201 F.3d 6, 10 (1st Cir. 2000) (quoting *Federal Trade Comm'n v. Henry Broch & Co.*, 363 U.S. 166, 168 (1960)).

> Throughout the first half of this century, manufacturers commonly utilized independent brokers to arrange the sales and distribution of goods to buyers. The price of the goods naturally reflected the cost of the broker. As the first large chain stores emerged, however, buyers developed sophisticated purchasing departments and dispensed with the need for brokers. Such buyers consequently began either to set up "dummy brokerages," staffed by their own employees, or to demand direct price concessions from sellers that reflected savings in the cost of brokerage and distribution.

Zeller Corp. v. Federal-Mogul Corp., No. 97-4134, 1999 U.S. App. LEXIS 6345, at *5 (6th Cir. 1999) (unpublished opinion).

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[6] The parties appear to be in agreement that the state claim rises or falls with the Sherman Act claim. (MSJ at 7 n.2; Objection at 21 n.18.)

[7] Most cases refer to Section 2(c) as being a section of the Robinson-Patman Act. In fact, Robinson-Patman amended the Clayton Act.

ANC does not refer to its case as either a "dummy brokerage" case or a case involving payment of a commission "in lieu of brokerage." Rather, ANC repeatedly refers to its Section 2(c) claim as a "commercial bribery" claim. Commercial bribery is a term of art that is frequently used, but seldom defined. Commercial bribery describes a situation in which a seller bribes an agent or employee of a buyer, to induce the buyer's agent to encourage purchases of the seller's product. *See, e.g.*, *Excel Handbag Co. v. Edison Bros. Stores, Inc.*, 630 F.2d 379, 386 (5th Cir. 1980) (describing secret payments to an agent inducing the purchase of goods for the principal from the party making those payments); *American Distilling Co. v. Wisconsin Liquor Co.*, 104 F.2d 582, 585 (7th Cir. 1939) (adopting Federal Trade Commission view of commercial bribery as "the practice of sellers of secretly paying money or making gifts to employees or agents to induce them to promote purchases by their own employers from the sellers offering the secret inducements").[8] It is an open question in this Circuit whether a commercial bribery claim is cognizable under Section 2(c), *see Bridges*, 201 F.3d at 11, although other circuits have held that commercial bribery is within the ambit of Section 2(c) based, primarily, on the legislative history of the Robinson-Patman Act and Supreme Court consideration[9] of the

[8] Commercial bribery is often understood to be an independent tort as well as a form of unfair trade practice. *See Seaboard Supply Co. v. Congoleum Corp.*, 770 F.2d 367, 372 (3rd Cir. 1985); *American Distilling*, 104 F.2d at 585. Commercial bribery is typically either engaged in because the seller's product is not competitively priced, *see, e.g., Mantek Div. of NCH Corp. v. Share Corp.*, 780 F.2d 702, 706 & 707 n.6 (7th Cir. 1986), or in order to ensure a lucrative contract is won, *see, e.g., Envtl. Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1055 (3d Cir. 1988); *Rangen, Inc., v. Sterling Nelson & Sons, Inc.*, 351 F.2d 851 (9th Cir. 1965).

[9] In *Henry Broch & Co.*, 363 U.S. at 169, the Supreme Court noted, "Congress in its wisdom phrased § 2(c) broadly, not only to cover the [dummy brokerage and related] methods then in existence but all other means by which brokerage could be used to effect price discrimination." 363 U.S. at 169 (footnote omitted). In footnote 6, the Court made reference to debates reflecting that Section 2(c), in addition to prohibiting abuses of the brokerage function, was "intended to proscribe other practices such as the 'bribing' of a seller's broker by the buyer." *Id.* at n.6 (citing 80 Cong. Rec. 7759-7760, 8111-8112.) N.B.: Presumably, the transposition of seller and buyer in the foregoing quote is reflected in the debate material because, in a subsequent footnote, the Court noted, "The brokerage clause in the bill was originally directed only at outright commission payments by sellers to buyers' agents." *Id.* at 171 n.9.

same, *see Envtl. Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1055 (3d Cir. 1988); *Grace v. E. J. Kozin Co.*, 538 F.2d 170, 173 (7th Cir. 1976); *Rangen, Inc., v. Sterling Nelson & Sons, Inc.*, 351 F.2d 851, 856-57 (9th Cir. 1965); *see also Fitch v. Kentucky-Tennessee Light & Power Co.*, 136 F.2d 12, 15-16 (6th Cir. 1943) (predating Supreme Court commentary). With these cases, every circuit but the Third has premised such recognition on the fact that an agency or employment relationship had been corrupted by the payment of bribes. *Grace v. E. J. Kozin Co.*, 538 F.2d at 173; *Rangen, Inc., v. Sterling Nelson & Sons, Inc.*, 351 F.2d at 858; *Fitch v. Kentucky-Tennessee Light & Power Co.*, 136 F.2d at 15. As the Defendants correctly argue (M/D Section B, at 15-18), ANC cannot make out a claim for commercial bribery because this case does not concern the corruption of an agency or employment relationship.

The fact that this case is not a commercial bribery case does not end the matter. The prohibitory language of Section 2(c) is broad, reading in terms of prohibiting all payments from a seller to a buyer. *See* 15 U.S.C. § 13(c). Thus, the Defendants fail to exhaust the possibility that, although mislabeled as a commercial bribery claim, ANC's claim may still be authorized by Section 2(c). In other words, is commercial bribery the only permissible departure from the Act's narrow purpose of prohibiting sham brokerage arrangements? In *Zeller*, a remarkably similar though unpublished case, one defendant, the buyer, demanded that plaintiff pay a $400,000 "signing bonus" to retain its business. *See Zeller*, 1999 U.S. App. LEXIS 6345 at *2 (unpublished opinion). When plaintiff declined, defendant buyer contracted with one of plaintiff's competitors, also a named defendant, who agreed to pay $500,000 over a four-year period. *See id.* at *2-*3. The plaintiff argued that the facts set forth a literal violation of Section 2(c) because the defendant had '"paid' . . . 'something of value' . . . 'as compensation' . . . without having 'rendered a service in connection with the sale or purchase of goods.'" *See id.* at *6 -*7. The court held,

> Although plaintiff's argument possesses some logical appeal, we decline to adopt any such broad reading of § 2(c). . . . § 2(c) does not forbid all negotiated price reductions. While it is true that this court and others have expanded the reach of § 2(c) beyond the context of brokerages, such expansion has been limited to cases of commercial bribery . . . .

Id. at *7 (citation omitted).[10] There are several other circuit court cases supporting the limitation imposed by the *Zeller* court on Section 2(c). *See, e.g., Lupia v. Stella D'Oro Biscuit Co., Inc.*, 586 F.2d 1163, 1169-70 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979) (holding Section 2(c) does not cover all indirect price concessions, only "discriminatory rebates . . . under the guise of 'brokerage fees' never actually earned"); *Ideal Plumbing Co. v. Benco, Inc.*, 529 F.2d 972, 997 (8th Cir. 1976) ("Despite the apparently broad reach of the . . . terminology 'commission, brokerage, or other compensation', . . . [t]he words . . . are intimately related to the purpose of the section and should be construed to mean compensation . . . for placing or obtaining an order for the purchase or sale of goods."); *Robinson v. Stanley Home Prod., Inc.*, 272 F.2d 601, 604 (1st Cir. 1959) ("The matter covered by section 2(c) is unearned brokerage, per se, not discrimination."); *The Intimate Bookshop, Inc. v. Barnes & Noble, Inc.*, 88 F. Supp. 2d. 133, 140 (S. D. N.Y. 2000) ("The fact that a direct payment . . . passes from one party to another . . . does not compel the conclusion that the payment . . . violates Section 2(c). In order to make out a prima facie . . . claim, a plaintiff must specifically plead that the payment or discount is in lieu of brokerage . . . ."); *see also Simplicity*, 360 U.S. at 65

[10] The *Zeller* court noted only one district court case allowing a Section 2(c) claim to go forward on analogous facts, *Atlantic Coast Vess Beverages, Inc. v. Farm Fresh, Inc.*, No. 3:93-CV-284 (E. D. Va. Oct. 8, 1993).

("Subsection (c) applies to the payment or receipt of commissions or brokerage allowances 'except for services rendered.'"); *Great Atlantic & Pacific Tea Co. v. FTC*, 106 F.2d 667 (3d Cir. 1939), *cert. denied,* 308 U.S. 625 (1940), *reh'g denied*, 309 U.S. 694 ("At each stage of its enactment, paragraph (c) was declared to be an absolute prohibition of the payment of brokerage to buyers or buyers' representatives or agents. Such is the plain intent of the Congress and thus we construe the statute. Any other result would frustrate the intent of Congress."); *Robinson v. Stanley Home Products, Inc.*, 272 F.2d 601, 604 (1st Cir. 1959) ("But the fact that there was discrimination between customers does not mean that the favored one received brokerage. The matter covered by section 2(c) is unearned brokerage, per se, not discrimination."). *But see Atlantic Coast Vess Beverages v. Farm Fresh, Inc.*, No. 3:93CV284 (E. D. Va. Oct. 8, 1993) (holding Section 2(c) may provide relief where a grocery retailer charged its sellers a slotting fee for access to its shelves).

Based on the foregoing discussion, I conclude that Section 2(c) is limited to sham brokerage arrangements or their functional equivalent and, potentially, commercial bribery. The existing case law on this issue does not support the contention that all payments of "compensation" unrelated to the receipt of service are caught within the broad net of the statutory language unless they involve sham brokerage arrangements or their functional equivalent or, in some circuits, commercial bribery. This restriction reflects sound policy. Litigants proceeding pursuant to Section 2(c) are assisted by the fact that the conduct prohibited in Section 2(c) is deemed unlawful per se, whereas litigants proceeding pursuant to Section 2(a) must prove injury to competition. *See Broch*, 363 U.S. at 170-71; *Simplicity*, 360 U.S. 64-65. It has been said that in deeming conduct in violation of Section 2(c) to be anti-competitive, Congress intended to force sellers to grant preferential prices in ways more susceptible of analysis under Section 2(a) because sham service arrangements such as dummy brokerages and payments in lieu of brokerage were particularly difficult to analyze under Section 2(a), which permits price differentials stemming from discrepancies in the costs of sale. *See Lupia*, 586 F.2d at 1169-1170, *cert. denied*, 440 U.S. 982 ("Congress outlawed unearned brokerage fees per se in order to force sellers to confine their discriminatory practices to those dealings whose effect could be more readily measured by the competitive yardstick of the 2(a) test.") (citing *Simplicity*, 360 U.S. at 68-69 and H.R. Rep. No. 2287, 74th Cong., 2d Sess. 16 (1936)); *Howell Industries, Inc. v. Sharon Steel Corp.*, 532 F. Supp. 400, 407 (S.D. Mich. 1981) ("Here, however, Plaintiff is asking the Court to extend the provisions of Section 2(c) to a situation more like a 'naked' price differential, intended to be remedied by Section 2(a), *see* H.R.Rep.No.2966, 84th Cong., 2d Sess. 97-98 (1956), than like an indirect price discrimination or commercial bribery circumstance in which 'anticompetitive practices and effects are hard to identify[.]'" (quoting *Lupia*, 586 F.2d at 1170, *cert. denied*, 440 U.S. 982 (1979)). Where, as here, the Defendants have not sought to hide price concessions behind the veil of a fictional brokerage or service agreement, there is no justification for the application of a per se rule and the price discrimination claim should proceed under Section 2(a). *Cf. Robinson*, 272 F.2d at 604 ("If, after ceasing to employ brokers, a manufacturer improperly discriminates between customers, section 2(a) will accomplish the purposes of the act.").

After reflecting on the nature of ANC's claim, I conclude that it is neither in the nature of illicit brokerage nor commercial bribery. Rather, it is a "functional discount" claim that belongs under Section 2(a)'s price discrimination provisions. *See Empire Rayon Yarn Co. v. American Viscose Corp.*, 364 F.2d 491, 492-93 (2d Cir. 1965). More specifically, ANC has what is called a "primary-line" price discrimination claim. In a primary line case, the plaintiff is a direct competitor with the defendant and the defendant is offering favored prices to the plaintiff's customers. *See Coastal Fuels Inc. v. Caribbean Petroleum Corp.,* 79 F.3d 182, 188 (1st Cir. 1996). By way of contrast, in a secondary line case, the plaintiff is a disfavored purchaser of the defendant seller, who is selling to one or more of the plaintiff's competitors at a discounted rate. *See id.* ANC's claim presents a case of "primary line price discrimination" because the parties are within the same line of commerce.

Although ANC suggests that Section 2(c) is the proper vehicle for competitor claims (Objection at 7), competitors have always been able to pursue claims under Section 2(a) of the Clayton Act, but they have been required to establish injury to competition as a component of their claim. *See Broch,* 363 U.S. at 169 n.3 ("Section 2 of the Clayton Act as originally enacted in 1914 . . . applied only to price discriminations the effect of which was to substantially lessen competition or tend to create a monopoly.") (citation and quotation omitted); *see also Coastal Fuels*, 79 F.3d at 188. Plaintiff here seeks to avail itself of the easier to prove "per se" standard of Subsection (c). In doing so it runs afoul of established caselaw and the underlying statutory policy. Based on this summary of the purposes and purview of Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, ANC's price discrimination claim, Count III, is brought under the wrong statutory subsection.

IV. Conclusion

Because the summary judgment facts do not reveal any market injury hazardous to consumer welfare, ANC's federal and state anti-trust claims, Counts I and II, must fail. The Court should dismiss Count III as well, because Section 2(c) of the Clayton Act is inapplicable to these facts. Based upon the foregoing, I recommend that the court **GRANT** the Defendants' Motion for Summary Judgment.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated: November 29, 2000

Margaret J. Kravchuk
U.S. Magistrate Judge

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                                                                     BANGOR
STNDRD
                      U.S. District Court
                  District of Maine (Bangor)

              CIVIL DOCKET FOR CASE #: 99-CV-166

AUGUSTA NEWS CO v. HUDSON NEWS CO, et al                             Filed:
06/28/99
Assigned to: JUDGE GENE CARTER                        Jury demand: Plaintiff
Demand: $0,000                                        Nature of Suit:  410
Lead Docket: None                                     Jurisdiction: Federal
Question
Dkt# in other court: None
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Cause: 15:15 Antitrust Litigation

AUGUSTA NEWS CO plaintiff	WILLIAM D. ROBITZEK 784-3576 [COR LD NTC] BERMAN & SIMMONS, P.A. P. O. BOX 961 LEWISTON, ME 04243-0961 784-3576

v.

HUDSON NEWS CO defendant	JOHN M.R. PATERSON 774-1200 [COR LD NTC] BERNSTEIN, SHUR, SAWYER, & NELSON 100 MIDDLE STREET P.O. BOX 9729 PORTLAND, ME 04104-5029 207-774-1200
PORTLAND NEWS CO defendant	JOHN M.R. PATERSON (See above) [COR LD NTC]
HUDSON-PORTLAND NEWS CO defendant	JOHN M.R. PATERSON (See above) [COR LD NTC]